



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/17360/2012
OA/17361/2012

THE IMMIGRATION ACTS

Heard at North Shields
On 8 April 2014

Determination Promulgated
On 16 June 2014

Before

UPPER TRIBUNAL JUDGE DEANS

Between

ENTRY CLEARANCE OFFICER, ADDIS ABABA

Appellant

and

MISS SAMIRA MUSTAFA BERIHU

1st Respondent

MR AMIR MUSTAFA BERIHU

2nd Respondent

Representation:

For the Appellant: Mrs C Dewison, Home Office Presenting Officer
For the Respondent: Ms C Soltani, Iris Law

DETERMINATION AND REASONS

- 1) This is an appeal by the Entry Clearance Officer against a decision by Judge of the First-tier Tribunal Shanahan allowing these appeals under Article 8. The Respondents (herein after referred to as "the Claimants") are children, born on 14 May 1998 and 4 June 1996, who applied for entry clearance to join their mother, Mrs Muna Nuruahmed Abdu, in the UK.

Error of law

- 2) Following the decision by Judge of the First-tier Tribunal Shanahan the ECO was granted permission to appeal and there was a hearing before Deputy Upper

Tribunal Judge Pickup on 7 October 2013 on the question of whether there was an error of law in the decision by Judge of the First-tier Tribunal Shanahan and whether that decision should be set aside. Judge Pickup found an error of law in the following terms:

“16. I find that the relevant issue was whether the mother and the [Claimants] could either continue or further develop their family life outside the UK, either in Eritrea, Ethiopia, or elsewhere. Further, if it was legally or physically possible for them to do so, whether it would be reasonable to expect her to leave the UK in order to do so. The answer to that question must have a material bearing on the outcome of the proportionality balancing exercise. The First-tier Tribunal Judge reached conclusions on this issue that had no foundation in any express findings of fact or on the basis on any evidence before her. I find that she made the assumption that it was impossible for family life to take place outside of the UK without evidential or factual support. In the circumstances, that must be an error of law which could have affected the outcome of the appeal, such that the Determination ought to be set aside.”

- 3) Judge Pickup was unable to proceed to remake the decision on the day of the hearing. The decision on the error of law issue was promulgated on 29 October 2013. The appeals were adjourned for a resumed hearing at a later date. In order to avoid undue delay the appeal was transferred from Judge Pickup to me.

Factual background

- 4) The background is set out in the determination of the First-tier Tribunal. The relationship between the Claimants and their mother was established by DNA evidence. It was accepted that the Claimants' father was deceased. The issues before the First-tier Tribunal were whether the mother had sole responsibility for the Claimants and whether there was adequate maintenance for them.
- 5) The evidence before the First-tier Tribunal was that at the time of the application for entry clearance the Claimants were looked after in Ethiopia by a friend of their mother, Saedia Mehammed. The Claimants' father was killed around 2001 but the Claimants' mother was not able to establish contact with them until around 2006 when she came to the UK. She had previously lost contact with the children after she was deported from Ethiopia to Eritrea in 1999. She had been born in Ethiopia but was of Eritrean descent while her husband, the Claimants' father, was Ethiopian.
- 6) The Claimants' mother is unemployed and suffers from ill health. She would not be able to provide adequate maintenance for the children herself but she has three friends who are willing to assist her. Before the First-tier Tribunal it was accepted by the Claimants that their mother required an additional £458.94 per month in order to support them adequately. Each of the three friends who had offered to help were willing to give £300 per month. The Judge of the First-tier Tribunal

observed, however, that none of those offering financial support attended the hearing. Two of those concerned, both doctors, explained that they were unable to attend because of work commitments. They provided some evidence of their financial standing but there was no evidence relating to their commitments and outgoings and as to their understanding of the responsibility that they would be undertaking, including the length of time for which this might need to continue. The judge was aware that a case which depended for success upon a third party's voluntary payment would need to be scrutinised with particular care. Accordingly the judge was not satisfied there was adequate maintenance for the Claimants without recourse to public funds.

- 7) Having decided that the Claimants could not succeed under the Immigration Rules the judge then considered the appeal under Article 8 and allowed it. This decision has been set aside, however, by Judge Pickup for the reasons set out above.

Resumed hearing before the Upper Tribunal

- 8) Prior to the hearing before me new evidence was lodged on behalf of the Claimants, in particular, an expert report by Dr John R Campbell. I allowed this new evidence to be admitted without objection. There was also an up-to-date witness statement by the Sponsor, the Claimants' mother, and a copy of her British passport containing an Ethiopian visit visa. The Sponsor appeared before me to give evidence and adopted her witness statement before being cross-examined by Mr Dewison.
- 9) The Sponsor was asked if she had acquired Ethiopian citizen on the basis of her marriage. The Sponsor explained that at the time she was married Ethiopia and Eritrea were one country and she did not have to apply. It was not until she was deported in 1999 that her ethnic background became an issue.
- 10) The Sponsor was asked if she had discussed with her husband obtaining Ethiopian nationality. The Sponsor replied that her husband was of Ethiopian origin so the children could stay but she had to leave. The authorities decided the children could stay with their father. Mr Dewison then asked the Sponsor if she had ever discussed obtaining Ethiopian nationality with her husband before 1999. The Sponsor replied that there was not a problem before 1999 and they did not speak of it. The Sponsor then described how she and her two brothers had taken part in an Eritrean referendum and because of this it was decided that they had to leave the country.
- 11) Mr Dewison referred to a guardianship document in respect of the Claimants which was before the First-tier Tribunal. In this guardianship document it was said that the Claimants' father had gone to Sudan and Saedia was described as their aunt, although she was not a relative. The Sponsor confirmed that her husband was killed in fighting between Ethiopia and Eritrea. She was asked if she had gone to court to arrange the guardianships. She explained that she did not have the right to go to court as she was Eritrean. She had left the children with her friend. It was

then put to her that her friend, Saedia, had made false claims in order to be appointed guardian. The Sponsor explained that Saedia had to say that she was an aunt otherwise the children would have been taken away for adoption. It was now difficult for Saedia to continue looking after the children because the boy was getting older and there were young daughters in the house. Saedia was not comfortable with having an older boy in the house with her daughters. The Sponsor was asked if she was in Ethiopia when the guardianship order was made. She replied that if she had been there she would have taken responsibility for the children.

- 12) The Sponsor confirmed that she had returned to Ethiopia using her British passport and she had obtained a visa at the airport in Ethiopia. The Sponsor was asked why she did not obtain a visa from the Ethiopian Embassy in the UK. She explained that she had told the Claimants that they had won their appeal and then it was overturned. They were very upset. She had no time to obtain a visa before going to see them. She confirmed that the visa allowed her to stay for three months. She stayed only for two weeks because she had to be back for a hearing on 7 October 2013. It is clear that this was the previous hearing before the Upper Tribunal.
- 13) The Sponsor was asked if she had enquired in Ethiopia about residing there permanently. She said that she did not ask because it was not her country anymore. When she arrived in Ethiopia she was taken ill. She was taken to hospital by ambulance. At the hospital she mentioned she was Eritrean so she was not treated like other patients. The Sponsor was asked why she did not say she was British. She said she did say she was British but because she spoke Tigrinyan she was asked her origin and she had to say she was from Eritrea.
- 14) The Sponsor was asked about the children's maintenance. She explained that their father had left some money in the bank and she sent money herself. She sent this to people travelling to Ethiopia or by Western Union.
- 15) The Sponsor was asked what language the children spoke and she said that they spoke Amharic because they had always lived in Gonder. She confirmed that she also spoke Amharic.
- 16) In re-examination the Sponsor explained that before the children lived with Saedia they lived with their father's sister but they stopped living with her three or four years ago when she moved to London. From that time on they lived with Saedia.

Submissions

- 17) In his submissions for the ECO Mr Dewison stated the issue was whether the Sponsor could return to live with the children in Ethiopia, either legally or reasonably. He referred to paragraph 24 of Judge Pickup's decision, in which the judge stated that no finding of fact had been made in respect of the Sponsor's account of being deported from Ethiopia to Eritrea in 1999. Mr Dewison referred to the grant of guardianship to Saedia, which she referred to as an "alleged" grant. He

referred to the difficulties the Sponsor had in remembering dates. According to the translation of the guardianship document in the Respondent's bundle, it was dated 15 March 2004 in the Ethiopian calendar, which was seven years before the Gregorian calendar, so this would make a date in 2011. According to the guardianship document the Sponsor and her husband had separated owing to difficulties within their marriage. The Sponsor had left and settled in England. It was stated that the father had fled to Sudan but not that he was killed. Mr Dewison said it was not accepted on behalf of the ECO that the Sponsor had been deported to Eritrea. According to the expert's report, at page 66, if the Sponsor wanted to live with the children in Ethiopia she would have to give up her British citizenship. The ECO was not requiring her to do this but was refusing entry to the children. There was doubt about the circumstances of the family as they had been living apart for a long time. The Sponsor had left the children fifteen years ago. There were inconsistencies in the evidence. The question was whether it was reasonable to expect the Sponsor to go to Ethiopia to be reunited with the children and in the view of the ECO it was.

- 18) For the Claimants, Ms Soltani referred to an appeal determination from 2006, in which the Sponsor was found to be an Eritrean national. It was accepted at the hearing before the First-tier Tribunal that there were anomalies in the guardianship document but these were explained on the basis that false statements had been made in order to secure the guardianship order. The dates were consistent with the Sponsor's account.
- 19) Ms Soltani submitted that the issues set out by Judge Pickup was whether it was legally or physically possible for the mother and the Claimants to continue their family life outside the UK. In this regard Ms Soltani submitted that the expert's report was clear. At paragraph 28 of the report the expert witness referred to two proclamations from 2002 and 2003, the effect of which was that the Sponsor, as an Ethiopian-born ethnic Eritrean (who was deported in 1999) would not be allowed to return to Ethiopia on a permanent basis. It was not the Sponsor's choice to leave the children behind. There was no reason not to accept her account of having been deported in 1999. Her British passport showed that she was born in Gonder, which was in Ethiopia, but she was given an Ethiopian visa on a temporary basis. The refusal decision stated that she had not seen the children since 1999. It was pointed out she did not have a passport until 2012. The guidance issued by the Secretary of State to Entry Clearance Officers required the best interests of the children to be taken into account. As the expert report pointed out, there is no social or healthcare in Ethiopia. It was suggested by Mr Dewison that the Sponsor could renounce her British citizenship to obtain Ethiopian citizenship but she would suffer adverse consequences as a result because of her ill health and this would not be proportionate. The additional evidence, including the expert's report, showed that the family could not live outside the UK.

Discussion

20) I had before me only part of the Tribunal's determination of 2006 in relation to the Sponsor's asylum appeal. The final pages of it are missing. However, as Ms Soltani submitted, it was accepted at that time that the Sponsor was an Eritrean national. She is now a British citizen. Mr Dewison questions the veracity of the Sponsor's claim that she was deported from Ethiopia to Eritrea in 1999. The expert report is based on the assumption that the Sponsor was deported in 1999. It states, at paragraph 22, the following:

"On the basis of extensive published research, it was the case that thousands of individuals of Eritrean descent/extraction whose parents were born in Eritrea and who did not possess formal Eritrean nationality were arrested by Ethiopia during the border war and deported to Eritrea (Campbell 2013: Chap.1)."

21) The expert report further comments, at paragraph 34, that while the evidence provided by the Sponsor regarding her arrest and deportation from Ethiopia was very limited, her claim to have been deported from Ethiopia due to her parents' birth in Eritrea was credible.

22) The Sponsor's account of her deportation accords with the background evidence. Her Eritrean origins do not appear to have been questioned in the 2006 appeal. I am therefore satisfied on the balance of probabilities that the Sponsor was deported at that time as she claimed.

23) The expert report goes on to state that someone who was an Ethiopian of Eritrean origin, as previously defined, and who was deported to Eritrea would not be allowed to return to Ethiopia to live permanently. It is further stated that tens of thousands of Ethiopian-born ethnic Eritreans in Ethiopia were stripped of their nationality during the war with Eritrea. As the Sponsor's parents were born in Eritrea, the Sponsor was not qualified by descent for Ethiopian nationality and she could not meet the conditions to make a legal application for nationality. A previous registration exercise for Ethiopian-born ethnic Eritreans was conducted in 2004 and had ended. The Sponsor would be allowed to reside temporarily in Ethiopia as a foreign visitor but she would not be allowed to obtain an immigration visa or stay for the four years required to apply for citizenship.

24) The expert's report states that the Sponsor and her children would in theory qualify for Eritrean nationality but they would be required to renounce their existing nationality to apply for Eritrean nationality as Eritrea does not recognise dual nationality. As the Sponsor was unable to work and support herself and her children, however, she would not meet a key criteria for admission into Eritrean nationality.

- 25) As I understand the position it is not argued at this stage that the family could reasonably be expected to relocate to Eritrea, particularly as the children are becoming of an age where they would be liable to be called up for national service. I do not understand it to be suggested that it would be in the best interests of the children for the Sponsor and the Claimants to relocate to Eritrea.
- 26) The only reasonable alternatives are residence in Ethiopia or residence in the UK. Although Mr Dewison submitted that the Sponsor could continue to reside in the UK while the Claimants remained in Ethiopia, this was not the issue identified by Judge Pickup in the Upper Tribunal determination of 29 October 2013. The relevant issue was stated as whether the Claimants and their mother could continue or develop their family life outside the UK.
- 27) On the question of whether the Sponsor could live with the children in Ethiopia the answer is now clear. She has a British passport and was able to obtain an Ethiopian visa to visit the children but that is as far as her rights are recognised as someone of Eritrean descent. It is not a question, as Mr Dewison suggested, of the Sponsor renouncing her British citizenship and claiming Ethiopian nationality because, as the expert report points out, she does not meet the relevant requirements for recognition as an Ethiopian national.
- 28) I am satisfied the position is that family life can only be carried on legally, and therefore reasonably, having regard to the best interests of the children, in the UK. I do not consider it would be reasonable to expect the Sponsor to live illegally or as an overstayer in Ethiopia. As Ms Soltani pointed out there is the issue of the Sponsor's health as well as the residence issue. Medical evidence before me shows that she suffers from asthma, renal calculi and back pain. She has difficulty walking and restricted mobility. She suffers from low mood, worry and hopelessness which appear to be caused by her children not being able to live with her in the UK. She described as having moderate symptoms of depression and severe symptoms of anxiety.
- 29) Having regard to the factors set out above, I am satisfied that the refusal decisions are disproportionate and that the appeals should be allowed under Article 8 in terms of respect for family life.

Conclusions

- 30) The making of the decision of the First-tier Tribunal was found to involve the making of an error on the point of law and has been set aside.
- 31) I remake the appeals by allowing them.

- 32) The Judge of the First-tier Tribunal made neither an anonymity direction nor a fee award. For the reasons given by the judge I do consider that a fee award is appropriate. I have not heard any submission in respect of anonymity and I do not consider such an order to be necessary.

Signed

Date

Judge of the Upper Tribunal